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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Authentic Fitness Products, Inc.

Serial No. 75/442,401

Karen Artz Ash and Monique L. Ribando of Amster, Rothstein
& Ebenstein for Authentic Fitness Products, Inc.

Jeri J. Fickes, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Seeherman, Wendel and Bottorff, Administrative
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Authentic Fitness Products, Inc. has filed an
application to register the mark TEE SWEAT for "men's,
women's and children's activewear clothing, namely, fleece
shirts, overalls, pants, sweaters, jackets, skirts, hats,
gloves."¹

¹ Serial No. 75/442,401, filed February 26, 1998, claiming a
first use date and a first use in commerce date of November 1995.

Registration has been finally refused on the ground that the mark is merely descriptive under Section 2(e)(1) of the Trademark Act. Applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.²

The Examining Attorney argues that the proposed mark TEE SWEAT merely describes at least some of applicant's activewear clothing. Relying upon dictionary definitions for the terms "tee," "T-shirt," "sweat," and "sweatshirt,"³ as well as Nexis excerpts showing use of the terms "tee" and "sweat" to refer to particular types of shirts, she maintains that TEE SWEAT merely describes garments having attributes of both tee shirts and sweat apparel, or more particularly, sweat shirts. She points to applicant's specimens and the description thereon of that specific item as a "sweatshirt in tee-shirt weight" as evidence that applicant's goods do include a hybrid of this nature. She argues that the pairing of the two descriptive terms does not create a unitary mark with a separate non-descriptive

² The request for reconsideration filed by applicant on September 8, 1999 has only recently been associated with the application file. We find applicant's arguments therein to be virtually identical with arguments made in its brief and thus ones fully considered by the Examining Attorney in writing her brief. Accordingly, we have determined that there is no need at this point to remand the case to the Examining Attorney for any further consideration.

³ Although the Examining Attorney did not introduce these definitions until her brief, we may take judicial notice of such matter and accordingly have considered the definitions.

meaning; that whether understood by purchasers as a "sweat" type of "tee" or as a "tee" "sweat" [shirt], the combined terms retain their descriptive significance.

Applicant insists that the mark TEE SWEAT requires the consumer to expend imagination to reach any conclusion about the nature of the goods identified thereby; that, although prospective customers, upon encountering applicant's mark may envision some type of T-shirt or sweatshirt or even a short-sleeved sweatshirt, the true nature of applicant's clothing is not readily apparent from the mark. Applicant argues that TEE SWEAT is at most suggestive of a type of garment for sports activities, and points to several third-party registrations for marks containing the term SWEAT as a portion thereof for similar goods as evidence⁴ of the suggestiveness of applicant's mark as a whole.⁵ Finally, applicant urges that any doubt as to whether the mark is merely descriptive should be resolved in applicant's favor.

A term or phrase is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys

⁴ The Examining Attorney has objected to applicant's listing of these third-party registrations in its brief as untimely under Trademark Rule 2.142(d) and as improper in form. We sustain the objection on both grounds and have given the third-party registrations no consideration in reaching our decision.

⁵ Applicant has offered in its brief to disclaim the term SWEAT, as has been done in many of the third-party registrations.

information about a characteristic or feature of the goods with which it is being used. Whether or not a particular term is merely descriptive is not determined in the abstract, but rather in relation to the goods for which registration is sought, the context in which the designation is being used, and the significance the designation is likely to have, because of the manner in which it is used, to the average purchaser as he encounters the goods bearing the designation. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that the term or phrase describe all the characteristics or features of the goods in order to be merely descriptive; it is sufficient if the term or phrase describes one significant attribute thereof. See *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991).

We find the dictionary definitions⁶ and the Nexus evidence fully adequate to conclude that the term TEE would

⁶ The dictionary definitions relied upon are:

- | | |
|---------|--|
| tee | 4. T-shirt |
| T-shirt | (also tee shirt) 1. a short-sleeved, collared undershirt. 2. an outer shirt of a design similar to the T-shirt. |
| sweat | 39. <i>Informal.</i> a. (of clothes) made to be worn for exercise, sports or other physical activity. b. made of the absorbent fabric used for such clothes: <i>sweat dresses.</i> |

be likely to be viewed by potential purchasers as the equivalent of the term "T-shirt," and the term SWEAT as a reference to activewear clothing, or, if used in connection with a shirt with a fleeced backing, as the type of shirt known as a "sweatshirt." Both terms would have descriptive significance when used in connection with items such as applicant's fleece shirts, which obviously are of the type of clothing described as "sweat" apparel and which may patterned in the style of a T-shirt.

We are not limited in our analysis, however, to the generally understood meanings of the terms TEE and SWEAT and their applicability to applicant's goods. Evidence of the context in which the mark is being used on labels or in advertising material is also probative of the reaction of prospective purchasers to the mark. See *In re Pharmaceutical Innovations, Inc.*, 217 USPQ 365 (TTAB 1983).

Here, the specimens of record show that applicant's TEE SWEAT sweatshirt is being explicitly represented to

c. of, for, or associated with such clothes:
the sweat look in sportswear.

sweatshirt a usually long-sleeved, collarless, oversize pullover made traditionally of heavy cotton jersey that has a fleeced backing.

purchasers on labels or hang tags as being a "sweatshirt in tee-shirt weight." Purchasers are not simply encountering a "fleece shirt" of any type, but a particular style in which the characteristics of a sweatshirt and a tee-shirt have been combined in a specific manner and which is being touted as a hybrid of this nature. Clearly, upon seeing the mark TEE SWEAT on a shirt of this type, potential purchasers would immediately grasp the descriptive significance of the designation. Not only is each component TEE and SWEAT descriptive of a particular feature of the goods; the combination TEE SWEAT is descriptive of the hybrid containing these features.⁷ There is no suggestive element in the mark as a whole, as argued by applicant; instead the combination of the two descriptive words results in a term or phrase which is also descriptive of applicant's goods.⁸

⁷ The dissent contends that the combination of TEE and SWEAT results in a composite term with an incongruous meaning "because tee-shirts and sweatshirts are different items of apparel," and because it would not be immediately apparent "whether the TEE SWEAT shirt is a tee-shirt made of fleece (sweatshirt material), or whether it is a light weight sweatshirt." We believe, however, that TEE SWEAT is merely descriptive of either and both of those possible products. The incongruity, if any, resides in the hybrid nature of the product itself, not in the mark.

⁸ In its application, applicant claimed ownership of S.N. 74/607,636 for the mark TEE SWEATS BY AUTHENTIC FITNESS for similar goods. Upon review of Office records, we note that applicant has disclaimed TEE SWEATS in that application.

Accordingly, we find no element of doubt here. The proposed mark TEE SWEAT when used in connection with at least some of applicant's goods is merely descriptive thereof. It is well settled that registration is properly refused if the proposed mark is merely descriptive of any of the goods for which registration is sought. See *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988) and the cases cited therein.

Decision: The refusal under Section 2(e)(1) is affirmed.

H. R. Wendel

C. M. Bottorff

Administrative Trademark Judges,
Trademark Trial and Appeal Board

Seeherman, Administrative Trademark Judge, dissenting:

As the cases recognize, there is but a thin line of distinction between a suggestive and a merely descriptive term. **In re Recovery, Inc.**, 196 USPQ 830 (TTAB 1977). Here, I think that TEE SWEAT for applicant's identified clothing items falls on the suggestive side of that line. Although there is no question that the individual elements in the mark, TEE and SWEAT, are descriptive terms for, respectively, tee shirts and sweatshirts, when these terms are combined in the mark TEE SWEAT the mark as a whole has an incongruous meaning because tee-shirts and sweatshirts are different items of apparel. One who is told that the mark is being used for a fleece shirt would not know whether the TEE SWEAT shirt is a tee-shirt made of fleece (sweatshirt material), or whether it is a light weight sweatshirt. In fact, it is only when one views the description of the product on the specimen labels, "Sweatshirt in tee-shirt weight," that one can understand what the item is. However, the test for whether a term is merely descriptive is not whether one can understand, after the product is explained, what the mark refers to, or how it is derived. Rather, to be found merely descriptive a mark must immediately convey information concerning a quality, characteristic, attribute or feature of a product.

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In re Venture Lending Associates, 226 USPQ 285 (TTAB 1985).

TEE SWEAT does not immediately convey such information about the identified fleece shirts (or, for that matter, the other clothing items) with which the mark is used.

Accordingly, I would reverse the refusal of registration.

E. J. Seeherman
Administrative Trademark Judge
Trademark Trial and Appeal Board